Supreme Court, U.S.
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In The
SUPREME COURT
OF THE UNITED STATES

October Term, 1998

GAREN ZAKARIAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

VERNON C. JOLLEY
Attorney at Law
17390 Mockingbird Canyon Road
Riverside, California 92504
Fax: (909) 789-4482
Telephone: (909) 789-4433
Attorney for Petitioner

28 pp

QUESTIONS PRESENTED

1. Whether Petitioner's Fifth Amendment rights were violated under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution at a third trial when he was tried, convicted and sentenced for violation of the Hobbs Act [18 U.S.C. § 1951]?

2. After having been acquitted in state court of murder and robbery, did the District Court commit error in granting the government's Motion in Limine in the two subsequent federal trials to preclude evidence that was admitted in state court which tended to prove that Petitioner was framed?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Garen Zakarian, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Ninth Circuit in this case is reproduced in the Appendix at the end of this Petition (App., A-E).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on August 6, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which is the subject of part of this Petition, is set forth below:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; ***nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb***; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without

just compensation." (Emphasis added).

STATEMENT OF THE CASE

The issues presented by this Petition for Writ of Certiorari involve matters that have transpired over the course of three (3) separate trials in both state and federal court which stem from the October 5, 1994, murder of Benita Mikhailian, who was shot and killed in her Glendale, California travel agency office. The State of California and Federal Government further alleged that the murder occurred during a robbery of approximately 80 airline ticket travel agency coupons and approximately 80 airline ticket auditor coupons.

Petitioner, Garen Zakarian, was arrested on October 7, 1994 and on January 4, 1995, a Complaint was filed in Los Angeles Superior Court, Case No. GA021609 alleging violations of California *Penal Code* 187: Murder, and *Penal Code* 211: Robbery. On December 21, 1995, Zakarian was acquitted of the murder and robbery charges and was thereafter released from custody.

Not being pleased with the outcome of the state trial, the District Attorney corroborated with the United States Attorney in furtherance of having this matter prosecuted under the Hobbs Act [18 U.S.C. § 1951]. Thereafter, on March 12, 1996, an Indictment was filed

against Zakarian setting forth six (6) Counts. Counts 1, 2 and 3 alleged violations of 18 U.S.C. § 1951: Conspiracy, Robbery and Violence in violation of the Hobbs Act; Count 4 alleged a violation of 18 U.S.C. § 924(c)(1): using a firearm during a crime of violence; Count 5 alleged a violation of 18 U.S.C. § 922(k): possession of a .380 caliber Beretta firearm with an obliterated serial number on the date of the robbery; and Count 6 alleged a violation of 26 U.S.C. § 5861(I): possession of a firearm silencer with no serial number as required by 26 U.S.C. § 5842.

During trial, on July 3, 1996, the government dismissed Count 1 for Conspiracy. On July 9, 1996, the jury reached a verdict on Counts 5 and 6, however, they were deadlocked on Counts 2, 3 and 4. On July 10, 1996, the trial court declared a mistrial as to Counts 2, 3 and 4.

Assuming that it could have yet a third "bite at the apple", the government indicated that it planned to retry Zakarian on Counts 2, 3 and 4. Counts 2, 3 and 4 as enumerated in the first federal trial were renumbered in an Amended Indictment as Counts 1, 2 and 3, respectively. After the second federal trial, on October 18, 1996, Zakarian was convicted on Counts 1, 2 and 3, and the jury verdict was entered on October 28, 1996.

On February 2, 1997, Zakarian was sentenced to a term of 1020 months and judgment was entered on February 3, 1997.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed in part and remanded in part. In remanding, the Ninth Circuit agreed with Zakarian that the two counts of the indictment charging Hobbs Act violations were multiplicitous, however, it affirmed on the remaining counts. Specifically, the Court held there was no error committed during Zakarian's third criminal trial based on the same facts. Zakarian unsuccessfully argued to the Ninth Circuit that the second federal trial for Hobbs Act violations (after acquittal in state court) violated the Double Jeopardy Clause, that exculpatory evidence was improperly excluded by the District Court and that the jury instruction were confusing and lead to an incongruous verdict in relation to the evidence presented at trial.

REASONS FOR GRANTING THE PETITION

This case presents a clear example of how the government can ultimately extract a conviction when it is allowed to retry individuals on the same set of facts by using different legal theories. Notwithstanding the fact that the Supreme Court has interpreted the Double Jeopardy Clause to allow this procedure under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), a person that is subjected to multiple federal trials after having been acquitted in

state court for the same wrongful conduct should be allowed to defend himself without interference from the government.

After having been acquitted in state court, the jury in the first federal trial convicted on the possession Count, but not on the Counts involving violations of the Hobbs Act, which included the violent act of murder in furtherance of the robbery. As such, an implied acquittal occurred on the robbery and murder, which were the predicate acts necessary to sustain a conviction on the Hobbs Act violation. In an attempt to circumvent this result, the Ninth Circuit reasoned that an implied acquittal fails, because he could have been convicted both for possession of a weapon and Hobbs Act violations without any inconsistency at all. (App. C). The Ninth Circuit fails to see the absolute true inconsistency produced by the jury's verdict and the reasoning of the Ninth Circuit: that is, in finding that Zakarian possessed the illegal weapons but that he didn't commit the robbery and murder clearly means that he possessed the weapons at times other than on the date of the murder and robbery. It is illogical, as the Ninth Circuit implies, that Zakarian could have possessed the illegal weapons at the crime scene and not used them. (App. E).

Our founding fathers and drafters of the Constitution never could have considered circumstances

such as those presented in this case to be outside of the protective umbrella of the Fifth Amendment Double Jeopardy Clause. When Zakarian appeared before the federal court on Hobbs Act violations, he stood innocent of robbery and murder charges because he had been acquitted of these very acts by a jury of his peers in state court. To then use these crimes as the predicate offenses to ultimately convict under the Hobbs Act runs afoul of the intent and meaning of the Fifth Amendment. Even though he was innocent of the robbery and the murder, he was again tried for the robbery and the murder in federal court; the only difference being was that the punishment for the robbery and the murder had changed under a violation of the Hobbs Act. There was truly nothing factually different between the state and federal prosecutions, only the terminology.

As such, Zakarian was wrongfully tried, convicted and sentenced on the Hobbs Act violations under 18 U.S.C. § 1951 in the federal trials, all in violation of the Double Jeopardy Clause of the Fifth Amendment.

Central to Zakarian's defense was that third parties were attempting to put him out of business by use of threats, intimidation and various incidents of actual violence against property and persons. Any person who is facing a second federal trial after a state court acquittal should have the absolute right to prove his innocence by showing that someone else had the ability, motive and opportunity to commit the crimes. In contravention of this

right, the trial court granted the government's Motion in Limine excluding critical exculpatory evidence, and the Ninth Circuit affirmed.

1.
ZAKARIAN WAS SUBJECTED TO DOUBLE JEOPARDY AT THE THIRD TRIAL WHEN HE WAS TRIED, CONVICTED AND SENTENCED FOR VIOLATION OF THE HOBBS ACT [18 U.S.C. § 1951]

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb." This protection applies both to successive punishments and to successive prosecutions for the same criminal offense.

In both the multiple punishment and multiple prosecution contexts, the Supreme Court has stated that where the two offenses for which the defendant is tried or punished cannot survive the "same-element" test, the double jeopardy bar applies. "The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishments and successive prosecutions." *U.S. v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 2856, 125 L.Ed.2d 556 (1993).

Zakarian was acquitted in state court of robbery and murder charges, but was thereafter tried in federal court for a variety of federal crimes which all related to the same

robbery and same murder. In the first federal trial, the jury returned a verdict on the illegal possession of the subject murder weapon, however it was hopelessly deadlocked on whether Zakarian had committed the robbery and murder, which was necessary to sustain a conviction on the Hobbs Act Violations.[1]

Zakarian was thereafter re-tried for a third time in the second federal trial, and was convicted on the remaining counts after the jury found that Zakarian committed the robbery and murder for which he had been acquitted in state court.

Zakarian argued to the Ninth Circuit that in order for the jury to find that he was guilty of possession of the murder weapon, the jury had to find that he possessed the gun at the crime scene where the murder occurred. This is consistent with Count 5 as set forth in the Indictment: "On or about October 5, 1994, in Los Angeles County, within the Central District of California, defendant GAREN ZAKARIAN possessed a firearm that had the importer's and manufacturer's serial number removed and obliterated,

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[1] It is of course interesting that the federal jury would even have to address the issue of the murder and robbery in that Zakarian had already been acquitted of these charges and specific actions in state court. Although he had been acquitted for these crimes, which implies that he was acquitted for the acts that constituted the crimes, he was nevertheless tried again with the basis of the federal prosecution being the violence resulting from the robbery and murder which ultimately affected interstate commerce in violation of the Hobbs Act.

namely a .380 caliber Beretta.

Based on the evidence before them, the jury in the first federal trial returned a verdict on the possession Counts, but was unable to find that Zakarian was guilty of the murder, which was the violent act that was the necessary prerequisite of the Hobbs Act violation. It is absolutely incongruous for the jury to find that Zakarian possessed the murder weapon at the murder scene, but did not use it. Logic would therefore dictate that the jury found that Zakarian possessed the illegal weapon at some time other than the date of the murder and that he did not possess the weapon at the murder scene on the date of the murder. And, if he did not possess the weapon at the murder scene, then he could not have committed the murder.

In *United States v. McLaurin*, 57 F.3d 823,826 (9th Cir. 1995), the Ninth Circuit stated:

> "The Supreme Court has recognized, however, that for double jeopardy purposes, acquittal may be either express or implied. . . . The government may proceed in a single prosecution on inconsistent theories, but the Double Jeopardy Clause's prohibition against successive prosecutions prevents the government from retrying the defendant on a theory inconsistent with an earlier judgment of conviction or acquittal."

In that the jury convicted on the possession Count, but not on the Counts involving violations of the Hobbs Act, which included the violent act of murder in

furtherance of the robbery, an implied acquittal occurred. In an attempt to circumvent this result, the Ninth Circuit reasoned that "an 'implied acquittal' also fails, as he could have been convicted both for possession of a weapon and Hobbs Act violations without any inconsistency at all." (App. C).

Our founding fathers and drafters of the Constitution never could have considered circumstances such as those presented in this case to be outside of the protective umbrella of the Fifth Amendment Double Jeopardy Clause. When Zakarian appeared before the federal court on Hobbs Act violations, he stood innocent of robbery and murder charges and had been acquitted of these very acts by a jury of his peers in state court. To then use these crimes as the predicate offenses to ultimately convict under the Hobbs Act runs afoul of the intent and meaning of the Fifth Amendment. Even though he was innocent of the robbery and the murder, he was again tried for the robbery and the murder in federal court; the only difference being was that the punishment for the robbery and the murder had changed under a violation of the Hobbs Act. There was truly nothing factually different between the state and federal prosecutions, only the terminology.

As such, Zakarian was wrongfully tried, convicted and sentenced on the Hobbs Act violations under 18

U.S.C. § 1951 in the federal trials, all in violation of the Double Jeopardy Clause of the Fifth Amendment.

2.
AFTER A STATE COURT ACQUITTAL, THE DISTRICT COURT COMMITTED ERROR WHEN IT GRANTED THE GOVERNMENT'S MOTION IN LIMINE

Prior to the first federal trial, the government filed a Motion in Limine wherein it sought to exclude certain testimony and evidence admitted during the state trial which related to Zakarian's defense of being framed. As can be inferred from the verdict of acquittal in the state court case, the evidence and testimony regarding these issues and defenses that were admitted into evidence necessarily had to have been considered by the jury in determining that Zakarian was not guilty of the charged offenses, that is, robbery and murder. Having the ability to review in detail the defense presented during the state court trial, coupled with the fact that the government was essentially getting a "second bite at the apple", the government's Motion in Limine sought to exclude important and necessary evidence relating to an extremely crucial defense that someone else did the crimes. Rather than appeal the state court acquittal on grounds that erroneous and inadmissible evidence was admitted, the government sought to have this critical evidence excluded in the federal proceedings. In justification of the District Court's ruling on the Motion in Limine, the Ninth Circuit reasons that Zakarian was allowed to present some of his

"alibi" evidence, so why should he complain. (App. D).

As part of the defense in the state trial, Zakarian presented evidence of threats and acts of intimidation and violence directed at Zakarian individually and at his company, EconoTrans. Zakarian contended that he was framed for the robbery and the murder and that these acts of violence and intimidation towards him, his family and his business, illustrated a concerted plan and scheme to put him out of business. The acts and events were not presented as direct evidence of the fact that Benita Mikhailian was killed in order to "frame" Zakarian and drive EconoTrans out of business, but as circumstantial evidence that someone else was responsible for the crimes. This evidence, when viewed in conjunction with all of the other evidence that Zakarian produced at the state trial, and anticipated producing at the subsequent federal trials, was clearly relevant under *Fed. R. Evid.* 401 to show that someone else was responsible for the crimes because there is a strong "tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The government advanced the position, and the District Court adopted the reasoning, that unless there is absolute and unequivocal direct evidence of a frame or that someone else did the crimes, then the evidence is inadmissible under *Fed. R. Evid.* 401-404. The problem with this position is that in order to frame someone successfully, or cover-up a crime, the person creating the fraudulent situation must necessarily do a good job in order not to get caught and there is rarely direct evidence

of the true facts when the frame is good.

In opposition to the government's motion, it was argued that it was central to Zakarian's defense that he be allowed to offer evidence of the attempts to drive EconoTrans out of business. By eliminating the evidence that Zakarian was framed and leaving Zakarian with a defense amounting to a statement that he didn't commit the murder, the jury would ask the same question as noted by the Ninth Circuit in *United States v. Crosby*, 75 F.3d 1343 (9th Cir. 1996), that is, "If Garen Zakarian didn't kill Benita Mikailian (sic), who did?" The evidence that was excluded would have answered this question and would have decreased confusion on the part of the jury rather than increase confusion as contended by the government. See, *Crosby, supra,* at 1348.

Each incident that was excluded in the federal trials, when viewed separately, may warrant an inquiry on relevancy grounds, however, when all of the incidents are taken as a whole, they clearly become relevant to show that others had the opportunity, ability and motive to drive EconoTrans out of business. Viewing the evidence in its entirety and the exculpatory implication that someone else had the motive to commit the crime in an effort to frame Zakarian and force him out of business, the jury could have reasonably believed that Zakarian did not commit the crimes. And what better indicator of relevancy than the results of the first trial in state court: an acquittal on all charges. To acquit Zakarian, the jury had to find that someone other than Zakarian committed the robbery and the murder. The jury wasn't confused in the first trial; it was merely given the opportunity to review all of the

evidence relating to the innocence of Zakarian.

A defendant has historically been entitled to prove his innocence by showing that someone else committed the crime. *United States v. Robinson*, 544 F.2d 110 (2nd Cir. 1977); *United States v. Holt*, 342 F.2d 163 (5th Cir. 1965). In *United States v. Crosby*, 75 F.3d 1343, 1347, 1349 (9th Cir. 1996), the Ninth Circuit discussed at length the requirements for admissibility of such exculpatory evidence.

> "We start with the observation that '[f]undamental standards of relevancy . . . require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged." *United States v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980); *see also United States v. Perkins*, 937 F.2d 1397, 1400 (9th Cir. 1991)('A defendant is entitled to introduce evidence which tends to prove someone else committed the crime.'); *United States v. Brannon*, 616 F.2d 413, 418 (9th Cir. 1980)('A defendant is entitled to prove his innocence by showing that someone else committed the crime.'). The excluded evidence here was exactly of that type: **It showed that someone other than Crosby had the opportunity, ability and motive to commit the crime.** . . . . In short, the excluded evidence supported an alternative theory of how the crime might have been committed.

> "This argument was crucial to the defense. . . . The jurors would naturally ask themselves, 'If the defendant didn't beat Dorothy, who did?' Introduction of the Hoskie evidence would have answered this question, rebutting the inference that Crosby must have committed the assault because no one else was in a position to do so." (Emphasis added)
>
> *United States v. Crosby* at 1347
>
> "'[I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.'"
>
> *United States v. Crosby* at 1349

The Ninth Circuit further stated in *Crosby* that in "'making a determination [under rule 403], the balance in close cases is struck in favor of admission'". *Crosby* at 1347. Compounding the defendant's dilemma in *Crosby* was the allegation by defendant that the police investigation was sloppy and that a more thorough investigation would have exonerated him. *Id.* Zakarian also complained of sloppy and incompetent police work

resulting from the mistaken release from detention of a critically important key witness, Anait Zakarian, a co-defendant.

Zakarian filed his Motion to Dismiss for Failure to Preserve Evidence which was denied by the trial court. By way of his Motion, Zakarian argued that the testimony of Anait Zakarian would have been material and favorable to the defense in that her testimony would have placed Zakarian at a different location than the crime scene at the time the robbery and murder took place. Anait Zakarian also was the only available exculpatory witness to explain a footprint, the workout bag and the contents, that is, the murder weapon, silencer with Zakarian's fingerprint, clothing, etc., that was used against Zakarian during the trials. She would have further testified regarding other matters that would have tended to prove the innocence of Zakarian. In light of the fact that Zakarian was deprived of the benefit of valuable exculpatory testimony and evidence due to the specific conduct of the government, Zakarian's ability to prove his innocence was made considerably more difficult.

As such, the policy considerations enunciated in *Crosby* regarding "sloppy" police work and shifting favor towards admitting evidence in "close cases" would be satisfied by admitting the testimony regarding attempts to put EconoTrans out of business.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

DATED: November 2, 1998

Respectfully submitted,

VERNON C. JOLLEY
Attorney for Petitioner
17390 Mockingbird Canyon Road
Riverside, California 92504
(909) 789-4433

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 97-50118
	D.C. No. CR-96-00279-SVW-1
	MEMORANDUM*
GAREN ZAKARIAN, Defendant-Appellant.	

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted July 10, 1998
Pasadena, California

Before: FLETCHER, FERNANDEZ, and RYMER, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

-B-

Garen Zakarian appeals his conviction for robbery affecting commerce in violation of 18 U.S.C. 1951, commission of physical violence in furtherance of a plan to commit robbery affecting commerce in violation of 18 U.S.C. 1951, use of a firearm equipped with a silencer during the robbery in violation of 18 U.S.C. 924(c)(1), possession of a firearm with an obliterated serial number in violation of 18 U.S.C. 922(k), and possession of a silencer without a serial number in violation of 26 U.S.C. 5861. We have jurisdiction, 28 U.S.C. 1291, and we affirm in part and remand in part.

I

Zakarian contends that retrying him for violations of the Hobbs Act violated his double jeopardy rights under Gradv v. Corbin, 495 U.S. 508 (1990). However, he has waived this claim since it was not raised in the district court.[1] See United States v. Lorenzo, 995 F.2d 1448, 1457 (9th Cir. 1993). In any event, the argument fails under the same offense test set forth in Blockburger v. United States, 284 U.S. 299 (1932), which controls. See United States v. Dixon, 509 U.S. 688, 704 (1993) (overruling Grady v. Corbin).

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1 In the district court, Zakarian argued that the federal trial violated the Double Jeopardy Clause because he had been tried in state court. He did not argue that his first federal trial barred his second federal trial.

Zakarian's assertion that retrial on the Hobbs Act charges violates the Double Jeopardy Clause because the first federal jury's deadlock amounted to an "implied acquittal" also fails, as he could have been convicted both for possession of a weapon and Hobbs Act violations without any inconsistency at all. Cf. United States v McLaurin, 57 F.3d 823 (9th Cir. 1995).

II

Zakarian argues that because he was wrongfully tried for the Hobbs Act violations, there was no predicate violent crime upon which a violation of 18 U.S.C. 924(c)(1) could be based. As we disagree that he was wrongfully tried for Hobbs Act violations, this contention lacks merit.

III

Zakarian contends that the district court should not have excluded evidence of alleged attempts to drive EconoTrans out of business, but we disagree. As the district court found, there was no link between the proffered Armenian intrigue evidence and any person Zakarian claimed was responsible for Mikailian's murder. Cf. United States v. Crosby, 75 F.3d 1343, 1345-47 (9th Cir. 1996) (error to exclude evidence that tended to show that the victim's spouse had the opportunity, ability, and motive to kill her). On the other hand, Zakarian was able to introduce evidence to show

that Minoukian committed the crimes and framed him. He was, therefore, permitted to present relevant evidence and was precluded only from presenting confusing evidence that had no tendency to prove that Minoukian did it. For this purpose it does not matter that much of the excluded evidence was allowed in state court proceedings where Zakarian was acquitted; our review is for abuse of discretion under the Federal Rules, and we see none.

Zakarian also argues that since he was deprived of Anait's testimony that would have been material and favorable, his defense that someone else committed the crime became all the more important. We can not see how this should have changed the district court's analysis, for Anait's testimony was lost when she decided to flee the country after she was mistakenly released from police custody. That decision does not transform the district court's decision to exclude irrelevant evidence into an abuse of discretion.

IV

Zakarian faults the "on or about" instruction on the footing that it essentially amended the indictment and resulted in inconsistent verdicts because it allowed the jury to convict him for possession and Hobbs Act violations on some date other than October 5, 1994. Our review is for plain error as Zakarian did not object to this instruction at trial, see United States v. English, 92 F.3d 909, 914 (9th Cir. 1996), and there

is none.

Nothing found by the first federal jury creates an inconsistency. Failure to convict on the Hobbs Act charges of robbery and physical violence does not mean that the jury impliedly found that Zakarian did not possess the .380 Beretta on or at the scene of the crime; it simply indicates that the jury did not unanimously agree on a verdict (that he used it). Nor do we understand how the instruction amended the indictment because the indictment itself charges that Zakarian committed various crimes "[o]n or about" October 5.

V

Zakarian contends, and the government concedes, that the two counts of the indictment charging Hobbs Act violations are multiplicitous. Consequently, we remand for the district court to vacate and stay the judgment of conviction on Count 2 or Count 3 and to resentence, if necessary. See United States V Sanchez-Lopez, 879 F.2d 541, 549-50 (9th Cir. 1989); cf. United States v. Nash, 115 F.3d 1431, 1438 (9th Cir. 1997), cert. denied, 118 S.Ct. 1054 (1998). The stay shall become permanent upon the completion of the sentence on the remaining count.

AFFIRMED IN PART; REMANDED IN PART.